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No. 83-1010

In the Supreme Court of the United States

OCTOBER TERM, 1983

BROWN & WILLIAMSON TOBACCO CORPORATION,
PETITIONER

v.

FEDERAL TRADE COMMISSION

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SIXTH CIRCUIT

BRIEF FOR THE FEDERAL TRADE COMMISSION IN OPPOSITION

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QUESTION PRESENTED

Whether, in an action for injunctive relief in which further fact-finding is not necessary to resolve the issues, a court of appeals may finally determine the merits of the action on review of the district court's judgment denying a preliminary injunction and dismissing the complaint on jurisdictional grounds.

TABLE OF CONTENTS

Page

Opinions below 1

Jurisdiction 1

Statutory provisions involved 2

Statement 2

Argument 9

Conclusion 15

TABLE OF AUTHORITIES

Cases:

Abbott Laboratories v. *Gardner*, 387 U.S. 136 ..... 6, 12

Aerojet-General Corp. v. *American Arbitration Ass'n*, 478 F.2d 248 10

Athlone Industries v. *Consumer Prod. Safety Comm'n*, 707 F.2d 1485 11

Camp v. *Pitts*, 411 U.S. 138 13

Castner v. *Coffman*, 178 U.S. 168 10

CES Publishing Corp. v. *St. Regis Publications, Inc.*, 531 F.2d 11 10

Dandridge v. *Williams*, 397 U.S. 471 10

Deckert v. *Independence Shares Corp.*, 311 U.S. 282 10

Denver v. *New York Trust Co.*, 229 U.S. 123 10

Dunlop v. *Bachowski*, 421 U.S. 560 13

Page

Cases—Continued:

Friarton Estates Corp. v. *City of New York*, 681 F.2d 150 10

FTC v. *Brown & Williamson Tobacco Co.*, 1983-2 Trade Cas. (CCH) para. 65,662 (Oct. 14, 1983); Order and Judgment, Civil Action No. 83-1940 (D.D.C. filed Oct. 25, 1983), appeal docketed No. 83-2129 (D.C. Cir. Oct. 28, 1983); motion for stay denied (D.C. Cir. Nov. 7, 1983) 8-9, 14

Grosso v. *United States*, 390 U.S. 62 11

Harriman v. *Northern Securities Co.*, 197 U.S. 244 10

Harron v. *United Hospital Center, Inc.*, 522 F.2d 1133, cert. denied, 424 U.S. 916 10

Hurwitz v. *Directors Guild of America, Inc.*, 364 F.2d 67, cert. denied, 385 U.S. 971 9

Independent Bankers Ass'n v. *Heimann*, 613 F.2d 1164, cert. denied, 449 U.S. 823 11

Independent Broker-Dealers' Trade Ass'n v. *SEC*, 442 F.2d 132, cert. denied, 404 U.S. 828 11

Mast, Foos & Co. v. *Stover Mfg. Co.*, 177 U.S. 485 10

Mercury Motor Express, Inc. v. *Brinke*, 475 F.2d 1086 9

Metropolitan Water Co. v. *Kaw Valley Drainage District*, 223 U.S. 519 10

Page

Cases—Continued:

National Automatic Laundry & Cleaning Council v. *Shultz*, 443 F.2d 689 11

National Wildlife Federation v. *Snow*, 561 F.2d 227 11

Scarlett v. *Seaboard Coast Line R.R.*, 676 F.2d 1043 9

Smith v. *Vulcan Iron Works*, 165 U.S. 518 9-10

Tampa Suburban R.R., In re, 168 U.S. 583 9

United States v. *American Railway Express Co.*, 265 U.S. 425 10

United States v. *Bianchi & Co.*, 373 U.S. 709 13

United States v. *Stauffer Chemical Co.*, No. 82-1448 (Jan. 10, 1984) 14

United States Fidelity Co. v. *Bray*, 225 U.S. 205 10

Statutes:

Administrative Procedure Act, 5 U.S.C. 551 *et seq.* 2

5 U.S.C. 553 ..... 5, 11

5 U.S.C. 553(b) 7

5 U.S.C. 702 5

5 U.S.C. 704 5

5 U.S.C. 706(2)(A) 5, 11, 12

Page

Statutes—Continued:

Federal Trade Commission Act, § 5, 15 U.S.C. 45 8

28 U.S.C. 2106 9

Miscellaneous:

48 Fed. Reg. (1983):

p. 15953 8

p. 22992 8

9 Moore, Ward & Lucas, *Moore's Federal Practice* (2d ed. 1983) 9

16 Wright, Miller, Cooper & Gressman, *Federal Practice and Procedure* (1977) 10, 13

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OPINIONS BELOW

The opinion of the court of appeals (Pet. App. B1-B28) is reported at 710 F.2d 1165. The order of the court of appeals denying petitioner's request for rehearing (Pet. App. D1-D3) is reported at 717 F.2d 963. The opinion of the district court (Pet. App. C1-C6) is not reported.

JURISDICTION

The judgment of the court of appeals was entered on June 24, 1983. A petition for rehearing was denied on September 19, 1983 (Pet. App. D1-D3). The petition for a writ of certiorari was filed on December 16, 1983. The jurisdiction of this Court is invoked under 28 U.S.C. 1254(1).

STATUTORY PROVISIONS INVOLVED

Pertinent provisions of the Administrative Procedure Act, 5 U.S.C. 551 *et seq.* are set forth at Pet. App. E1-E6.

STATEMENT

1. Since 1967, the Federal Trade Commission has conducted a testing program to analyze and report the tar and nicotine yield of the various brands of cigarettes sold in the United States. The tests, which utilize a smoking machine, are designed to determine the amount of tar and nicotine that a hypothetical smoker would receive if that person smoked cigarettes under specific standardized conditions. The purpose of the testing method is to provide an objective and comparative basis for assessing the relative amounts of tar and nicotine that cigarettes will deliver when each is smoked in the same way (Pet. App. B1-B2). Since 1971, the leading cigarette companies voluntarily have disclosed in advertising the tar and nicotine data pertaining to their cigarettes, derived either from the most recently published FTC test results or from their own tests applying the FTC method (Pet. App. B2).[1]

2. In January 1981, petitioner Brown & Williamson Tobacco Corporation introduced a new cigarette brand—"Barclay." Petitioner heavily promoted Barclay as a cigarette that contained only 1 mg. tar (Pet. App. C3). The R. J. Reynolds Tobacco Company, later joined by a number of other cigarette manufacturers, complained to the Commission that the claim that Barclay cigarettes contained only 1 mg. tar was inaccurate. They asserted that the filter used in the Barclay cigarette is unlike other filters, because when it is smoked between human lips, its air

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[1]The Commission had commenced a rulemaking proceeding in 1970 to require disclosures in advertising of the FTC tar and nicotine figures. The rulemaking was suspended when the companies agreed voluntarily among themselves to disclose this information (Pet. App. B2).

ventilation system inevitably is obstructed, causing the cigarette to deliver disproportionately more tar and nicotine than other comparably rated cigarettes.[2] The FTC's test machine did not reproduce this obstruction. Thus, the other cigarette manufacturers claimed, the FTC test method did not accurately rate the Barclay (Pet. App. B3).

The Commission commenced an inquiry to determine if the Barclay cigarette was accurately rated by the FTC testing methodology. It solicited comments and evidence on this question from all the cigarette companies. Petitioner participated fully in the Commission's inquiry, presenting evidence to support its own contentions and commenting upon studies performed by others (Pet. App. B14-B17).

To assist in evaluation of the evidence, the Commission selected three consultants, each of whom is a respected expert in the chemistry or use of tobacco. None was connected with any cigarette company. The three experts analyzed the extensive data and tests on the Barclay that were submitted to the Commission by petitioner and other cigarette companies. Working independently, each scientist arrived at the same ultimate conclusion: that the Barclay cigarette is not properly rated by the FTC testing methods and that when smoked by humans, it yields substantially

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[2]The court of appeals explained (Pet. App. B3):

> Cigarette manufacturers have traditionally lowered the "tar" content of cigarettes by allowing air to be mixed with the smoke to dilute the intensity of the smoke. Most low "tar" cigarettes have a filter surrounded by porous paper with one or more rows of small ventilating holes encircling the filter which allow air into the smoke channel. The Barclay cigarette, however, has four lengthwise channels to conduct the air from the ventilating holes directly into the mouth. The air does not mix with the smoke until both are in the smoker's mouth. The amount of air dilution in the Barclay cigarette may be reduced if the smoker crushes or blocks channels with his lips.

more tar than other cigarettes rated 1 mg. tar. Their estimates of the proper tar rating for the Barclay ranged between 3 mg. and 7 mg. (Pet. App. B15, B17-B18).

After reviewing the evidence and the reports of the three scientists, the Commission, on June 25, 1982, issued a press release announcing the following determinations (Pet. App. B2):

> (1) the present FTC testing methodology does not accurately assess the tar and nicotine yields of Barclay cigarettes, and the Commission will not accept the test results based on the current methodology as substantiation for claims made about the tar and nicotine content of Barclay cigarettes;
>
> (2) a prior FTC report stating that the tar yield of the Barclay cigarette is 1 mg. was inaccurate, and the report would be amended to omit Barclay's rating; and
>
> (3) pending a revision in the test methodology to provide for an accurate measurement of the Barclay yield, future FTC reports would not include test results for Barclay cigarettes.

At the same time, the Commission informed petitioner that it intended to publish this information in a notice in the *Federal Register* and to request public comment on several issues, including how to modify the FTC testing methodology (Pet. App. B3).

3. After the Commission's announcement, petitioner immediately commenced this action in the United States District Court for the Western District of Kentucky to enjoin the Commission, temporarily and permanently, from: (1) amending its most recent tar and nicotine report to delete Barclay's 1 mg. tar rating; (2) refusing to continue to test Barclay by its present test methodology or to publish the results of such tests in future reports; and (3) prohibiting

petitioner from relying on the Commission's present test methodology to substantiate the claim that Barclay is a 1 mg. tar cigarette. The complaint alleged that the Commission's determinations of June 25, 1982, amounted to substantive rulemaking and were in violation of the rulemaking requirements of the Administrative Procedure Act (APA), 5 U.S.C. 553, because the Commission had not provided notice and an opportunity for comment. The complaint also alleged that the Commission's actions were arbitrary, capricious, an abuse of agency discretion, and not supported by the evidence before the Commission at the time of its action, and therefore should be set aside under 5 U.S.C. 706(2)(A) (Pet. App. F12). The district court issued a temporary restraining order to maintain the status quo until it ruled on petitioner's application for a preliminary injunction (Pet. App. B3-B4).

Petitioner's motion for preliminary injunction and the Commission's opposition were submitted to the district court, after oral argument, on the basis of affidavits and exhibits. Included in the documents before the court was the entire administrative record — the written submissions to the Commission from the cigarette companies (including petitioner), the test data and studies that were before the Commission, and the reports of the Commission's consultants.[3]

The district court held that the Commission's determinations were not "final agency action" and for this reason were not reviewable under 5 U.S.C. 702 and 704. The court

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[3]The district court, over Commission objections, placed the exhibits constituting the administrative record under seal (Pet. App. B4).

therefore denied preliminary relief and dismissed the complaint (Pet. App. C1-C6).[4]

4. a. The court of appeals held that the district court had erred in dismissing the complaint on jurisdictional grounds, and it entered judgment for the Commission on the merits (Pet. App. B1-B19).[5] The court of appeals ruled that under the principles of ripeness enunciated in *Abbott Laboratories* v. *Gardner*, 387 U.S. 136 (1967), the Commission's June 25, 1982 announcement constituted final agency action appropriate for judicial review. In reaching that conclusion, the court noted, inter alia, that petitioner's challenges raised legal issues that could be determined without further fact-finding proceedings before the agency (Pet. App. B10), that petitioner would suffer substantial hardship if judicial resolution of its complaint were delayed until the Commission instituted an enforcement proceeding (*id.* at B10-B11), and that the public interest would be served by a resolution of the dispute without further delay (*id.* at B11).

After concluding that the matter was ripe for judicial review and concluding that a remand "would entail further delay," the court decided "in the interest of judicial

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[4]The district court did issue an injunction pending appeal, the effect of which was to prevent the Commission from publishing its proposed notice in the *Federal Register* and from taking any enforcement action against the 1 mg. tar claim made in petitioner's advertising for Barclay cigarettes. Shortly after oral argument before the court of appeals, that court, on April 1, 1983, dissolved the injunction, ruling that even if the Commission's determinations constituted reviewable agency action, petitioner had not shown that it was likely to succeed on the merits of its complaint (Pet. App. B4).

[5]The court also vacated the district court's orders sealing the record (Pet. App. B19-B28). See note 3, *supra*.

economy to reach the merits of this case" (Pet. App. B12) (footnote omitted).[6] On the merits, the court rejected petitioner's claims under the APA because, even if it is assumed that the Commission's actions amounted to substantive rulemaking subject to notice and comment requirements, petitioner had received ample notice and opportunity to comment on the Commission's proposed action (Pet. App. B12-B17). See 5 U.S.C. 553(b). In addition, the court of appeals found that the Commission's June 25, 1982 determinations were fully supported by "overwhelming evidence [before the Commission] that Barclay was inaccurately being reported as a 1 mg. 'tar' cigarette" (Pet. App. B18). The court of appeals also concluded that the Commission's actions based on this evidence were not arbitrary and capricious, observing that "the FTC appropriately took action to halt the dissemination of misleading and incorrect statistics to the public" and that the Commission appropriately treated Barclay cigarettes differently "for legitimate and well-documented reasons" stemming from the cigarettes' "unique filter construction" (*id.* at B18-B19).

b. Petitioner then moved for reconsideration, arguing that the panel had exceeded the scope of appropriate appellate review by deciding the merits of the case rather than simply reversing the district court's dismissal on jurisdictional grounds and remanding for further proceedings. The court of appeals denied the petition for reconsideration (Pet. App. D1-D3). It pointed out that an appeal from a denial of injunctive relief brings the whole record before the appellate court and that the scope of review may extend to all matters appropriately raised by the record, including

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[6]The court's decision to reach the merits was consistent with the positions of the parties below. Both the Commission and petitioner had argued that further fact-finding proceedings before the district court were unnecessary to decide the issues presented. See, *e.g.*, Pet. App. F19-F21; Appellee Br. 29 n.17.

entry of final judgment. The court also noted that petitioner's argument that it lacked such power in this case because further fact-finding procedures were necessary was in "striking inconsistency" with the position that petitioner's counsel had taken in their briefs and in oral argument (Pet. App. D2-D3).

5. After the court of appeals vacated the district court's injunction pending appeal on April 1, 1983, the Commission published a notice in the *Federal Register* deleting the values listed for Barclay cigarettes in past reports. 48 Fed. Reg. 15953 (Apr. 13, 1983), clarified, 48 Fed. Reg. 22992 (May 23, 1983). The Commission also notified petitioner that it would consider continued advertising claims that Barclay contained 1 mg. tar to be a deceptive practice under Section 5 of the Federal Trade Commission Act, 15 U.S.C. 45. Petitioner nevertheless continued to state in its advertising that Barclay cigarettes contain only 1 mg. tar. The Commission therefore filed suit for injunctive relief on July 7, 1983 in the United States District Court for the District of Columbia. After expedited discovery and a six-day trial, the district court found the "1 mg. tar" claim deceptive and permanently enjoined petitioner from promoting Barclay cigarettes with any claim of a specific milligram tar rating unless that rating is approved by the Commission or is established using a testing methodology approved by the Commission. The district court did, however, permit petitioner to represent in advertising that Barclay is "99% tar free" or "ultra low tar." *FTC* v. *Brown & Williamson Tobacco Co.*, 1983-2 Trade Cas. (CCH) para. 65,662 (Oct. 14, 1983); Order and Judgment, Civil Action No. 83-1049 (D.D.C. filed Oct. 25, 1983), appeal docketed, No. 83-2129 (D.C. Cir. Oct. 28, 1983). On November 7, 1983, the United States Court of Appeals for the District of Columbia Circuit denied petitioner's request for a stay pending appeal,

concluding that petitioner "ha[d] utterly failed to demonstrate any likelihood of ultimately succeeding on the merits of its appeal." Slip. op. 2.

ARGUMENT

The court of appeals' decision to enter final judgment on the merits of petitioner's substantive claims was a valid and proper exercise of its appellate jurisdiction. The administrative record was before the court, and, as petitioner had acknowledged, further fact-finding was unnecessary to decide the merits. In these circumstances, the decision presents no conflict with any decision of this Court or another court of appeals. Nor is there any other reason for further review, especially in light of the six-day trial petitioner received on matters pertaining to its Barclay cigarette in the separate action filed by the Commission in the District of Columbia.

1. Although a reviewing court usually will decide only those issues which were decided by the lower court and which are necessary to dispose of an appeal, it long has been recognized that this rule is not jurisdictional. *In re Tampa Suburban R.R.*, 168 U.S. 583, 588 (1897); *Scarlett* v. *Seaboard Coast Line R.R.*, 676 F.2d 1043, 1052 (5th Cir. 1982); *Mercury Motor Express, Inc.* v. *Brinke*, 475 F.2d 1086, 1091 (5th Cir. 1973); *Hurwitz* v. *Directors Guild of America, Inc.*, 364 F.2d 67, 70 (2d Cir.), cert. denied, 385 U.S. 971 (1966); 9 Moore, Ward & Lucas, *Moore's Federal Practice* para. 110.25[1], at 273 (2d ed. 1983) ("[O]nce a case is lawfully before a court of appeals, it does not lack power to do what plainly ought to be done.").[7] And it has been clear

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[7]See also 28 U.S.C. 2106 (emphasis added):

> The Supreme Court *or any other court of appellate jurisdiction* may affirm, modify, vacate, set aside or reverse any judgment, decree, or order of a court lawfully brought before it for review, and *may remand the cause and direct the entry of such appropriate judgment, decree, or order*, or require such further proceedings to be had *as may be just under the circumstances*.

since *Smith* v. *Vulcan Iron Works*, 165 U.S. 518, 524-525 (1897), that, as stated in *Metropolitan Water Co.* v. *Kaw Valley Drainage District*, 223 U.S. 519, 523 (1912), "on appeal from a mere interlocutory order the Circuit Court of Appeals might direct the bill to be dismissed if it appeared that the complainant was not entitled to maintain its suit." [8] See also *Deckert* v. *Independence Shares Corp.*, 311 U.S. 282, 287 (1940); *Denver* v. *New York Trust Co.*, 229 U.S. 123, 136 (1913); *United States Fidelity Co.* v. *Bray*, 225 U.S. 205, 214 (1912); *Harriman* v. *Northern Securities Co.*, 197 U.S. 244, 287 (1905); *Castner* v. *Coffman*, 178 U.S. 168, 183-184 (1900); *Mast, Foos & Co.* v. *Stover Mfg. Co.*, 177 U.S. 485, 494-495 (1900); *Friarton Estates Corp.* v. *City of New York*, 681 F.2d 150, 160-161 (2d Cir. 1982); *CES Publishing Corp.* v. *St. Regis Publications, Inc.*, 531 F.2d 11, 15 (2d Cir. 1975); *Harron* v. *United Hospital Center, Inc.*, 522 F.2d 1133 (4th Cir. 1975), cert. denied, 424 U.S. 916 (1976); *Aerojet-General Corp.* v. *American Arbitration Ass'n*, 478 F.2d 248, 252-253 (9th Cir. 1973); 16 Wright, Miller, Cooper & Gressman, *Federal Practice and Procedure* § 3921, at 17 (1977).

The decisions of other courts of appeals cited by petitioner (Pet. 8-9) are consistent with these principles. They simply represent instances in which the appellate court deemed it inappropriate to reach the merits of the case, usually because further trial proceedings were contemplated. On the other hand, where agency action has been

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[8] Moreover, petitioner appealed not only from an "interlocutory order" — *i.e.*, the district court's denial of a preliminary injunction — but also from the final judgment of the district court dismissing the complaint. It is well settled that a reviewing court may consider "any ground" in support of the judgment, "whether or not that ground was relied upon or even considered by the trial court." *Dandridge* v. *Williams*, 397 U.S. 471, 475 n.6 (1970); *United States* v. *American Railway Express Co.*, 265 U.S. 425, 435 (1924).

challenged and the record of the agency proceeding is before the court, it is not unusual for the appellate court to proceed to dispose of the case on the merits after reversing the district court's dismissal of the case for want of jurisdiction, if no further fact-finding proceedings are warranted. See, *e.g.*, *Athlone Industries* v. *Consumer Prod. Safety Comm'n*, 707 F.2d 1485, 1487-1488, 1490 (D.C. Cir. 1983); *Independent Bankers Ass'n* v. *Heimann*, 613 F.2d 1164, 1167 (D.C. Cir. 1979), cert. denied, 449 U.S. 823 (1980); *National Wildlife Federation* v. *Snow*, 561 F.2d 227 (D.C. Cir. 1976); *National Automatic Laundry & Cleaning Council* v. *Shultz*, 443 F.2d 689 (D.C. Cir. 1971); *Independent Broker-Dealers' Trade Ass'n* v. *SEC*, 442 F.2d 132 (D.C. Cir.), cert. denied, 404 U.S. 828 (1971). See also *Grosso* v. *United States*, 390 U.S. 62, 71-72 (1968). In sum, there is no conflict among the circuits on the question of the propriety of a court of appeals' disposing of the case on the merits in circumstances such as those presented here.

2. The court of appeals' decision to resolve the merits was entirely appropriate in the circumstances of this case. Petitioner had asserted two bases for relief in its underlying action. The first was that the Commission's determinations of June 25, 1982 constituted substantive rules issued without following the notice-and-comment rulemaking procedures required by 5 U.S.C. 553 (Pet. App. F12, G12-G16). The second was that the Commission's actions were arbitrary and capricious under 5 U.S.C. 706(2)(A) because they were illegally discriminatory, vague, and unsupported by the evidence before the Commission (Pet. App. F12, G16-G21).

Once the court of appeals determined that the challenged Commission determinations constituted final agency action subject to judicial review, the court of appeals was in as good a position as the district court to review the merits of petitioner's contentions. The entire administrative record

had been filed in the district court by the Commission when it opposed petitioner's motion for a preliminary injunction. Further proceedings to develop the record before the district court therefore were unnecessary. Indeed, petitioner had essentially conceded as much in its brief in the court of appeals, in which it argued that the matter was ripe for review under *Abbott Laboratories* because its challenges to the legality of the Commission's conduct "raise purely legal issues" (Pet. App. F3) and that further fact finding was unnecessary to resolve the issues presented (Pet. App. F19-F21).[9] Petitioner — having prevailed on these points in the court of appeals and thereby persuaded that court that the matter was ripe for judicial review — cannot fairly turn about and claim in this Court that the court of appeals erred in accepting the same arguments for the purpose of disposing of the merits.

Moreover, there could be no occasion for the sort of evidentiary proceedings in district court for which petitioner now says the court of appeals should have provided. It is well established that under the arbitrary and capricious standard of review in 5 U.S.C. 706(2)(A), "the focal point for judicial review should be the administrative record already in existence, not some new record made initially in

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[9]Petitioner now claims (Pet. 14) that the court of appeals was mistaken in concluding that it had agreed that the entire case could be resolved by the district court on the record then before it, asserting that it had agreed only that its motion for a preliminary injunction could be resolved by the district court without a further evidentiary hearing. However, petitioner's statements in the court of appeals regarding the lack of any need for further fact-finding procedures before the district court were unqualified and were made in the context of arguing that its case for permanent injunctive relief raised purely "legal" issues of administrative law that were ripe for judicial review. It stated, for example, that "the FTC has claimed that it has submitted to the district court the entire record upon which its actions were based. To resolve [petitioner's] substantive challenge, the district court need only apply the law to the facts already before it" (Pet. App. F20-F21).

the [district] court." *Camp* v. *Pitts*, 411 U.S. 138, 142 (1973). Where, as here, the agency has issued a written statement sufficiently setting forth its finding and evaluation of the evidence,[10] the "validity of [the agency's] action must * * * stand or fall on the propriety of [its findings and statement,] judged, of course, by the appropriate standard of review," without recourse to further fact-finding procedures. *Id.* at 143. See also *Dunlop* v. *Bachowski*, 421 U.S. 560, 572-573 (1975); *United States* v. *Bianchi & Co.*, 373 U.S. 709, 715 (1963).

Thus, in deciding to consider the ultimate merits of petitioner's case, the court of appeals not only acted within the limits of its authority, but also sensibly utilized that authority to conserve over-taxed judicial resources. Remanding the matter to the district court would not have served the goal that petitioner itself advocated — to "*expedite* final resolution of the issues" (Pet. App. F23 (emphasis in original)) — but instead would inevitably have delayed that resolution. Such a remand would have served no purpose other than to "require wasted litigation without any offsetting advantage in economy of appellate effort or uninterrupted trial court proceedings." 16 Wright, Miller, Cooper & Gressman, *Federal Practice and Procedure* § 3921, at 17 (1977). There was no reason for that course here, especially in view of the strong public interest in preventing misleading advertising.

3. In any event, this case would not be a suitable vehicle for this Court's consideration of the questions petitioner seeks to raise. Subsequent events have rendered academic petitioner's contention that it should have been afforded an

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[10]Shortly after the Commission's June 25 determinations were announced, it issued a 23-page statement setting forth in detail the issues, its evaluation of the evidence, and the conclusions it reached (Def. Exh. 147).

evidentiary hearing before the district court on the Commission's June 25th determinations. As explained above (see pages 8-9, *supra*), following the court of appeals' decision in this case, the Commission brought an enforcement proceeding against petitioner in the United States District Court for the District of Columbia, alleging that the company's advertising claim that Barclay cigarettes yield 1 mg. of tar was a deceptive practice under the FTC Act. After a full trial on the merits, during which petitioner obtained extensive discovery from the Commission, its competitors, and the expert consultants whose reports were relied upon by the Commission in its June 25th action, the district court issued a permanent injunction ordering the company to cease promoting its Barclay cigarettes with any claim of a specific milligram tar content rating unless that rating is approved by the Commission. On a record independent of that before the court below, the enforcement court concluded, inter alia, that the studies relied upon by the Commission —

> provide strong evidence that Barclay is improperly rated as 1 mg. because its vent system is "comprised" under actual smoking conditions, unlike the vent systems of other low-tar cigarettes. The evidence presented by [petitioner] failed to refute the ventilation studies and did not provide significant contrary evidence.

FTC v. *Brown & Williamson Tobacco Corp.*, 1983-2 Trade Cas. (CCH) para. 65,662, at 69299-90 to 69299-91 (D.C. Oct. 14, 1983), appeal docketed, No. 83-2129 (D.C. Cir. Oct. 28, 1983). Since the merits of the Barclay filter claims have thus been fully litigated in the enforcement action and resolved in a manner that will bind the parties under principles of collateral estoppel (cf. *United States* v. *Stauffer Chemical Co.*, No. 82-1448 (Jan. 10, 1984)), there is no need for this Court to review petitioner's unsuccessful effort

to delay resolution of the matter by challenges to the administrative action that preceded the enforcement action or its belated efforts to supplement the administrative record through duplicative proceedings in another district court.

CONCLUSION

The petition for a writ of certiorari should be denied.

Respectfully submitted.

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